Supreme Court, U.S.
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No. 87-1411

in the Supreme Court of the United States

October Term, 1987

NEW ENGLAND INSURANCE COMPANY,

Petitioner,

vs.

INTERNATIONAL BANK OF MIAMI, N.A.,

Respondent.

On Petition for Writ Of Certiorari To
the Third District Court of Appeal of Florida

PETITIONER'S BRIEF IN REPLY TO RESPONDENT'S OPPOSITION

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COUNTERSTATEMENT OF THE CASE

Petitioner, New England Insurance Company ("New England"), submits its Reply to both the facts and argument presented by Respondent, International Bank of Miami, N.A. ("IBM"), in its Brief in Opposition to New England's Petition for Writ of Certiorari, filed with this Court on February 22, 1988.

The Florida trial court violated Petitioner's due process rights by entering a judgment of $4,600,000 on a default with no notice or hearing or evidence whatever on the issue of damages.

New England takes issue with IBM's assertions regarding the factual background of this proceeding. A default judgment was entered against IBM because of the inadvertent misfiling of a document by a clerical employee, which caused New England not to respond to the complaint. IBM's suggestion that New England "refused" to file or serve an answer has no basis whatever.

IBM also refers to "several evidentiary hearings" on New England's motions to set aside the default judgment. To avoid confusion: While there were hearings before the trial court, New England was *not* granted a hearing for the determination of damages to be paid to IBM as a result of the default judgment. The trial court's failure to grant New England a hearing on the issue of damages, a clear denial of due process, is the only issue before this Court.

Finally, IBM is incorrect in its claims that New England failed to raise federal due process arguments below. In its Motion for Relief from Judgment and Petition for Rehearing in the trial court, New England stated specifically that it had been denied "notice and hearing" on the issue of damages and that therefore it was denied due process of law. [App.

5-9] Similarly, both New England's Initial and Reply Briefs before the Third District Court of Appeal specifically stated that the trial court's failure to allow notice and hearing on the issue of damages violated New England's due process rights. [App. 1-4]

In its Reply Brief, New England stated that, "[T]he basic premise of IBM's argument is that the absence of a defaulting insured from the proceedings obliterates a defaulting insurer's due process entitlement of notice and an opportunity to be heard on the issue of unliquidated damages." [App. 4] Similar arguments were raised in New England's Petition for Rehearing before the Florida appellate court.

New England has shown that it was deprived of due process rights under U.S. Const. amend. XIV, by the failure of the Florida courts to grant it a hearing on the amount of damages to be paid to IBM following a default.

ARGUMENT

1. This Court has Jurisdiction to Review the Substantial Federal Questions Raised by Petitioner

IBM claims that this Court has no jurisdiction of New England's Petition because New England did not raise federal constitutional arguments in the state court proceedings below. While New England did not specifically refer to the due process clause of U.S. Const. amend. XIV, in the trial and appellate proceedings below, New England's references to "notice and hearing" and "due process" were clearly intended to refer to federal as well as state due process issues and are sufficient to preserve a federal question for review. Reference to "due process" in legal parlance includes both state and federal claims. The fact that due process was referred to in New England's brief before the Florida

appellate court in a quote from *Bowman v. Kingsland Development, Inc.*, 432 So.2d 660, 663 (Fla. 5th DCA 1983), does not alter this fact. [*See* App. 2] The reference in *Bowman* is to general due process rights of Florida litigants and is not limited to Florida constitutional arguments.

This is quite a different situation from that in *Webb v. Webb*, 451 U.S. 493 (1981), cited by Respondent IBM. In *Webb*, although there were a number of references in Petitioner's pleadings below to "full faith and credit," this Court found no federal question because the record supported the conclusion that these references were to "a statutory full faith and credit requirement," not full faith and credit under the United States Constitution. 451 U.S. at 497.

Here, the opposite is true. New England's clear intention to raise federal constitutional arguments is obvious from the context of the pleadings and briefs where due process references appear. [App. 2, 4, 6-7, 9] Notice and hearing before taking of property, the concept discussed in *Bowman*, is the same argument raised in New England's brief before the appellate court, where it discussed the trial court's error in entering final judgment "without notice or hearing" on the issue of damages. [App. 1] This issue is at the very heart of a long line of due process cases decided by this Court under U.S. Const. amend. XIV. *See Mathews v. Eldridge*, 424 U.S. 319 (1976); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Fuentes v. Shevin*, 407 U.S. 67 (1972). Therefore, IBM is utterly wrong in its assertion that New England did not raise federal constitutional questions below.[1]

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[1]IBM also argues that federal due process was not raised below because it is not specifically mentioned in the Florida appellate court's *per curiam* opinion. This is incorrect. Two decisions cited by the Florida court in its *per curiam* opinion deal with the matter of due process and the right of a defaulting party to a hearing on damages. *See* Bowman v. Kingsland

[FOOTNOTE CONTINUED ON NEXT PAGE]

The facts at hand fall under this Court's holding in *Street v. New York*, 394 U.S. 576, 584 (1969). As stated in *Street*:

> There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented. (Citations omitted).

Stating that it was denied "notice and hearing" on the issue of damages, in violation of its "due process" rights, New England showed by "clear intendment" its reliance on the rights granted by U.S. Const. amend. XIV—the rights to due process of law. *Id. See also Douglas v. State of Alabama*, 380 U.S. 415, 422 (1965) ("[A]n objection which is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action is sufficient to serve legitimate state interests, and therefore sufficient to preserve the claim for review here").

Finally, the very nature of New England's complaint, regarding the due process effect of a state procedural rule,

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(Footnote 1 Continued)

Development, Inc., 432 So.2d 660, 663 (Fla. 5th DCA 1983). ("A defaulting party has a due process entitlement to notice and opportunity to be heard as to the presentation and evaluation of evidence necessary to a judicial determination of the amount of unliquidated damages."); North American Accident Ins. Co. v. Moreland, 60 Fla. 153, 53 So. 635 (1910). Moreover, assuming Respondent's contentions were correct, the fact that Florida courts ignored New England's constitutional claims only makes it more compelling for this Court to review the matter.

raises a federal question for consideration by this Court. As stated in *Henry v. Mississippi,* 379 U.S. 433, 447-8 (1965):

> [T]he question of when and how defaults in compliance with state procedural rules can preclude our consideration of a federal question is itself a federal question.
>
> * * *
>
> [A] litigant's procedural defaults in state proceedings do not prevent vindication of his federal rights unless the State's insistence on compliance with its procedural rule serves a legitimate state interest. In every case we must inquire whether the enforcement of a procedural forfeiture serves such a state interest. If it does not, the state procedural rule ought not be permitted to bar vindication of important federal rights.

The due process rights of Petitioner far outweigh any possible state interest in avoiding delay in disposition of cases in the state courts. The Florida procedural rules operate to punish a defaulting defendant by automatically deeming his damages "liquidated" so that he cannot obtain a hearing on the issue of damages. Where, as here, a party has been deprived of due process, as a punitive measure, due process is violated. *See Hovey v. Elliot,* 167 U.S. 409 (1897).

The record, as set forth in the attached Appendix, shows that New England has presented for this Court's consideration, a significant federal question under U.S. Const. amend. XIV. This Court clearly has jurisdiction to review New England's claim.

2. Respondent Has Misinterpreted New England's Due Process Argument

In addition to its baseless federal question arguments, and confusing the issues before this Court, IBM has completely misinterpreted New England's due process argument as set forth in its Petition for Certiorari. At pages 7 and 8 of its Brief in Opposition, IBM argues that New England was served with process and had notice of IBM's lawsuit against it. Therefore, IBM claims that New England has suffered no due process violations at the hands of the Florida courts.

But the question presented to this Court for consideration is whether New England was denied federal due process rights by the trial court's failure to allow New England notice or hearing *on the issue of damages after* entry of the default judgment and before the entry of final judgment.[2] As set forth in New England's Petition for Certiorari, such practice is an *ex parte* taking of property violative of due process. *See North Georgia Finishing, Inc., v. Di-chem, Inc.*, 419 U.S. 601, 606-608 (1975); *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982). IBM has missed the point entirely and its arguments are both irrelevant and unavailing.

3. The Issue Presented by Petitioner Involves Federal Law

Respondent IBM claims that New England's entitlement to notice and hearing on the issue of damages before entry of judgment is purely a matter of Florida procedure and

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[2]Thus, decisions cited by IBM regarding due process rights *before entry* of a default judgment are inapplicable to the facts at hand. *See* National Equipment Rental, Ltd. v. Szukhent, 375 U.S. 311, 315 (1964); Boddie v. Connecticut, 401 U.S. 371, 378 (1971).

Florida law. Specifically, IBM contends that the question before this Court is whether the Florida courts properly interpreted Rule 1.440(c), Fla. R. Civ. P. Such is not the case. New England has asked this Court to review the *application* of Rule 1.440(c) to a defaulting defendant by the Florida courts, which in fact deprives the defendant of its due process right to notice and hearing on the issue of damages.[3]

Although Florida courts have held that a defaulting party has a right to a hearing on "unliquidated damages," Florida courts have also held that the amount of damages to be paid by the defaulting party cannot be contested, thereby completely denying due process rights to the defaulting party. *Overseas Development, Inc. v. Dominion Mortgage Corp.*, 330 So.2d 845 (Fla. 3d DCA 1976); *North American Accident Insurance Co. v. Moreland*, 60 Fla. 153, 53 So. 635 (1910). [Cited in the Third District Court of Appeal's decision at 514 So.2d 390 (Fla. 3d DCA 1987).]

Thus, a default judgment automatically transforms any and all damages into "liquidated damages," a clear violation of due process. Even though Florida law ostensibly allows a defaulting defendant a hearing on "unliquidated" damages, since damages are automatically deemed liquidated (in which case there is no hearing), the supposed right to hearing is sham and illusory.

IBM further argues that New England's damages were deemed "liquidated" because Frank Preve, former President of IBM, also defaulted. IBM claims that, as insurer, New England is bound to pay for the loss caused by Preve's default and therefore has no right to a hearing on damages. This argument is absurd.

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[3]*See* Angel v. Bullington, 330 U.S. 183 (1947) ("[W]hether the claims are based on a federal right or are merely of local concern is itself a federal question . . . When an asserted federal right is denied, the sufficiency of the grounds of denial is for this Court to decide").

New England had no notice that Preve had defaulted and had no opportunity to present arguments as to the damages against Preve. New England was sued directly as a defendant in the Florida trial court. As such, New England is entitled to a hearing on the damages assessed against it in a default judgment. *North Georgia Finishing*, 419 U.S. at 606-608; *Mathews v. Eldridge*, 424 U.S. at 333.

Due process requires that New England have notice and opportunity to present evidence on the issue of damages due the Respondent "at a meaningful time and in a meaningful manner" before the actual taking of its property. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); *see also Peralta v. Heights Medical Center*, 56 U.S.L.W. 4189 (Feb. 24, 1988) (judicial sale of defaulting defendant's property, without notice or hearing, in order to satisfy a judgment, was violation of due process). New England has been deprived of valuable property rights in the amount of $4,600,000 plus interest without notice and in violation of due process.

CONCLUSION

This Court should issue a writ of certiorari to correct the state court's violation of U.S. Const. amend XIV.

Respectfully submitted,

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[EXCERPTS FROM BRIEF
OF NEW ENGLAND INSURANCE COMPANY]

IN THE DISTRICT COURT OF APPEAL
THIRD DISTRICT OF FLORIDA

CASE NO. 87-706

NEW ENGLAND INSURANCE COMPANY,

Appellant,

-vs-

INTERNATIONAL BANK OF MIAMI, N.A.,

Appellee.

On Appeal From the Eleventh Judicial Circuit Court
In And For Dade County, Florida

APPELLANT'S MAIN BRIEF AND APPENDIX

* * *

A. The Trial Court Erred In Entering Final Judgment Without A Hearing On Damages.

The trial court entered Final Judgment and Amended Final Judgment, without notice or hearing. The court took no proof, but merely relied on the amount prayed for in the complaint.[23]

* * *

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[23]The trial court expressed its view that, "[l]iquidated means that the parties know what it is [sic] being sued for." [2/3/87 transcript, A. 4009]

* * *

Under these circumstances, IBM's damages are unliquidated. *Bowman v. Kingsland Dev., Inc.*, 432 So.2d 660, 662 (Fla. 5th DCA 1983):

> Damages are liquidated when the proper amount to be awarded can be determined with exactness from the cause of action as pleaded, i.e., from a pleaded agreement between the parties, by an arithmetical calculation or by application of definite rules of law.

None of the foregoing rules apply in this case.

Moreover, IBM's prayer for relief could not have the effect of "liquidating" the damages sought in its complaint. Where the damages are unliquidated, not even an affidavit will serve to liquidate them. *See Harbour Tower Dev. Corp. v. Seaboard Equip. Co.*, 179 So.2d 405 (Fla. 3d DCA 1965) (default judgment based on affidavit of damages reversed where damages were unliquidated).

Under Florida law, when a claim involves unliquidated damages, "[a] defaulting party has a due process entitlement of notice and opportunity to be heard as to the presentation and evaluation of evidence necessary to a judicial determination of the amount of [those] damages." *Bowman, supra*, at 663; *Calder v. McNess*, 427 So.2d 393 (Fla. 4th DCA 1983); *Buffington v. Torcise*, ____ So.2d ____, 12 F.L.W. 849 (Fla. 3d DCA, March 24, 1987); Rule 1.440(c), Fla. R. Civ. P.

The trial court erred in denying New England this right.

The judgment should therefore be reversed.

* * *

[EXCERPTS FROM REPLY BRIEF
OF NEW ENGLAND INSURANCE COMPANY]

IN THE DISTRICT COURT OF APPEAL
THIRD DISTRICT OF FLORIDA

CASE NO. 87-706

NEW ENGLAND INSURANCE COMPANY,

Appellant,

-vs-

INTERNATIONAL BANK OF MIAMI, N.A.,

Appellee.

On Appeal From the Eleventh Judicial Circuit Court
In And For Dade County, Florida

APPELLANT'S REPLY BRIEF

* * *

The rule that a judgment against an insured is binding on the insurer applies to cases where the insurer has had notice of the proceedings against the insured and has an opportunity to defend. Here, New England had no notice that Preve had been served. Preve was served on August 12, 1985, over a year *after* service on New England, on the day IBM defaulted New England [A. 1249, 1250, 1251]. Preve was defaulted over two months later [A. 1255]. New England had no notice of Preve's default. Nor did New England have notice or an opportunity to defend against the ex-parte "determination" of $4.6 million in damages against Preve.

The cases IBM cites are therefore inapplicable here: *Atlantic Coast Dev. Corp. v. Napoleon Steel Contractors, Inc.*, 385 So.2d 676 (Fla. 3d DCA 1980) (third party defendant could not contest prior judgment against third-party plaintiff; third-party defendant had asked for and obtained a severance and did not appear at the trial of the main action to defend its interest); *Coblentz v. Amer. Surety Co. of New York*, 416 F.2d 1059 (5th Cir. 1969) (surety refused to handle insured's defense; insured consented to judgment; judgment conclusive on surety); *Alarm Systems of Fla., Inc. v. Singer*, 380 So.2d 1162 (Fla. 3d DCA 1980) (insurer's damages in a subrogation-type action were liquidated in the amount it had paid to insured).

Lastly, the basic premise of IBM's argument is that the absence of a defaulting insured from the proceedings obliterates a defaulting insured's due process entitlement of notice and an opportunity to be heard on the issue of unliquidated damages. This is not the law in Florida. *See* cases cited at Main Brief, page 39. [See App. 2]

Respectfully submitted,

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[EXCERPTS FROM TRIAL COURT MOTION OF NEW ENGLAND INSURANCE COMPANY]

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO.: 84-08521 CA 14

THE INTERNATIONAL BANK OF MIAMI, N.A.,

Plaintiff,

vs.

FRANK PREVE, JR., et al.,

Defendants.

New England Insurance Company's Renewed And/Or Amended 1.540 (b) Motion For Relief From Default And From Ex-Parte Judgments Entered Thereon, Not Withstanding The Facts That: (a) The Default Arose From Excusable Neglect By New England Personnel Below Corporate Level; (b) The Default Was Not Sought For Over A Year Following Service; (c) The Complaint Served Sought To Recover For Intentional Actions Not Covered By New England's Policy [Count IV] And For Negligence By A Bank Director Not Yet Determined And Still Actively Being Defended; (d) The Complaint Sought Unliquidated Damages "In Excess of $4.6 Million" Yet No Notice Of Hearing On Damages Was Afforded; (e) The Judgment Was Amended, Again Ex-Parte; (f) The Complaint Failed To Allege Jurisdictional Nexis To New England's Activities And Failed To Annex New England's Policy; (g) New England's Policy Coverage Was Limited To $3,000,000, Yet The

Judgment Is For $4,600,00; And (h) Plaintiff Has Received Payment Or Partial Payment From Others For Which New England Is Being Given No Credit.

Florida Bar No. 096095

Defendant, New England Insurance Company, formerly known as New England Reinsurance Corporation ("New England"), respectfully submits its renewed and/or Amended Motion for Relief from Default and from Ex-Parte Judgments Entered Thereon and states:

* * *

No definite rules of law "are present for which the Court can assess damages, without the aid of evidence. Neither Count IV nor V of the Amended Complaint identify a concrete date of breach or loss." The Amended Complaint does not attach any documentation or evidence to allow this Court to make an arithmetical calculation. No contract exists setting forth a formula or an agreed amount. Without elaboration or explanation, Count IV claims that Preve claimed damages of "more than $4,600,000." Yet testimony is necessary to identify the losses, to determine when they occurred, and to substantiate the allegations that the amounts sued for were indeed the same sums alleged in Counts IV and V to have been misappropriated or improperly used. A value judgment must be on this testimony in order for the court to make a determination of the damages.

Even were it true that New England had no coverage or other defenses available due to the entry of the default, New England would not and could not be required to accept Plaintiff's allegations of the damages at face value.

> A defaulting party has a due process entitlement to notice and opportunity to be heard as to the presentation and evaluation of evidence necessary to a judicial determination of the amount of unliquidated damages.

432 So.2d at 663.

* * *

[EXCERPTS FROM TRIAL COURT MOTION FOR REHEARING OF NEW ENGLAND INSURANCE COMPANY]

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

CASE NO: 84-08521

Fla. Bar No. 378399

INTERNATIONAL BANK OF MIAMI, N.A.,

Plaintiff,

vs.

FRANK PREVE, JR., et al.

Defendants.

MOTION FOR REHEARING ON DEFENDANT'S MOTION FOR RELIEF FROM FINAL JUDGMENT AND TO VACATE DEFAULT

* * *

In the instant case, no definite rules of law are present to allow this Court to assess damages without the aid of evidence. Neither Count IV nor V of the Amended Complaint identify a concrete date of breach or loss. The Amended Complaint does not attach any documentation or evidence to allow this Court to make an arithmetical calculation. No contract exists setting forth a formula or an agreed amount. Testimony is necessary to identify the losses, to determine when they occurred, and to substantiate the allegations that the amounts sued for were indeed the same sums alleged in

Counts IV and V to have been misappropriated or improperly used. A value judgment must be placed on this testimony in order for the court to make a determination of the damages.

Even were it true that New England had no coverage or other defenses available due to the entry of the default, New England would not and could not be required to accept Plaintiff's allegations of the damages at face value.

> A defaulting party has a due process entitlement to notice and opportunity to be heard as to the presentation and evaluation of evidence necessary to a judicial determination of the amount of unliquidated damages.

432 So. 2d at 663.

* * *